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No. 397 17

In the Supreme Court of the United States

OCTOBER TERM, 1956

EINAR RASMUSSEN, PETITIONER,

v.

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT

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OPINIONS BELOW

The opinion of the Court of Appeals (Pet. 15-20; R. 47-53) is not yet reported. The ruling in the District Court (Pet. 13-15; R. 9-11) is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 14, 1956 (Pet. 20; R. 54). The issuance of a copy of its opinion and a certified copy of its judgment was stayed by the Court of Appeals pending disposition by this Court of *Ceballos* v. *Shaughnessy*, No. 71, this Term (certiorari granted, June 11, 1956, 351 U.S. 981)

or until further order (R. 55). The petition for a writ of certiorari was filed on September 10, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the determination of the Director of Selective Service that Denmark was a neutral country, for the purpose of exemption from military service under Section 3(a) of the Selective Training and Service Act of 1940, is subject to judicial review.

2. Whether the Court of Appeals erred in not remanding this case to the trial court for determination of whether the petitioner was actually deferred from military service on the basis of his claim for exemption as a neutral alien under Section 3(a) of the Selective Training and Service Act of 1940.

3. Whether petitioner's ineligibility for citizenship under Section 3(a) of the Selective Training and Service Act of 1940, which provides that a neutral alien who makes application for exemption from military service under its provisions is debarred from thereafter becoming a citizen, is voided by his reliance, in making the application for exemption, upon the erroneous advice of his draft board that an alien illegally in the United States could not become a citizen by serving in the Army.

STATUTES AND REGULATIONS INVOLVED

Section 3(a) of the Selective Training and Service Act of 1940, 54 Stat. 885, as amended, 50 U.S.C. App. (1946 ed.) 303(a), provided in pertinent part:

> Sec. 3. (a) Except as otherwise provided in this Act, every * * * male person residing in the

United States, who is between the ages of eighteen and forty-five * * * shall be liable for training and service in the land or naval forces of the United States: *Provided*, That any citizen or subject of a neutral country shall be relieved from liability for training and service under this Act if, prior to his induction into the land or naval forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President, but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States. * * *

Section 10 of the Selective Training and Service Act of 1940, 54 Stat. 893, as amended, 57 Stat. 598 (1943), 50 U.S.C. App. (1946 ed.) 310(b), provided in pertinent part:

Sec. 10. * * *

(b) The President is authorized to delegate to the Director of Selective Service only, any authority vested in him under this Act (except section 9). The Director of Selective Service may delegate and provide for the delegation of any authority so delegated to him by the President * * * to such officers, agents, or persons as he may designate or appoint * * *.

Section 13(c) of the Immigration Act of 1924, 43 Stat. 162, as amended, 8 U.S.C. (1946 ed.) 213(c), provided in pertinent part:

Sec. 13. * * *

* * * * *

(c) No alien ineligible to citizenship shall be admitted to the United States unless such alien (1) is admissible as a non-quota immigrant * * *, or (2) is the wife, or the unmarried child under 18 years of age, of an immigrant * * *, or (3) is not an immigrant as defined in section 3.

Section 14 of the Immigration Act of 1924, 43 Stat. 162, as amended, 8 U.S.C. (1946 ed.) 214, provided in pertinent part:

Sec. 4. Any alien who at any time after entering the United States is found to have been at the time of entry not entitled under this Act to enter the United States * * * shall be taken into custody and deported * * *.

Section 315(a) of the Immigration and Nationality Act of 1952, 66 Stat. 242, 8 U.S.C. 1426(a), provides:

Sec. 315. (a) Notwithstanding the provisions of section 405 (b), any alien who applies or has applied for exemption or discharge from training or service in the Armed Forces or in the National Security Training Corps of the United States on the ground that he is an alien, and is or was relieved or discharged from such training or service on such ground, shall be permanently ineligible to become a citizen of the United States.

32 C.F.R. 601.2 (Cum. Supp., 1944 Ed.), 6 F.R. 6825, 7 F.R. 10802, provided:

* * * * *

(c) The term "citizen or subject of a neutral country" is used to designate an alien who is a

citizen or subject of a country which is neither a cobelligerent country nor an enemy country;

(d) The term "cobelligerent country" means any country at war with a country against which the United States has declared war.

(e) The term "alien enemy" means a citizen or subject of any country who has been or may hereafter be proclaimed by the President to be an alien enemy of the United States.

STATEMENT

Petitioner, a citizen and native of Denmark, instituted an action in the District Court for the District of Columbia to have himself adjudged eligible for citizenship and thus not deportable under the provisions of Section 13(c) and 14 of the Immigration Act of 1924 (*supra*, pp. 3-4) as an alien illegally in this country who at the time of his last entry was inadmissible because of his ineligibility for citizenship.

Petitioner's ineligibility for citizenship is grounded upon his execution on April 26, 1943, of a selective service form, D.S.S. Form 301 (R. 1), which was an application for relief from military service as a national of a neutral country under the provisions of Section 3(a) of the Selective Training and Service Act of 1940 (*supra*, pp. 2-3), which provided that the filing of such an application by a neutral alien debarred the applicant from thereafter becoming a citizen of the United States.

Petitioner's complaint alleged that, after filing this application, he was given a deferred status and thereafter classified 4A (over-age) (R. 1). The complaint does not allege that he misunderstood the consequence

of signing the application (R. 1-3). However, his attorney explained to the District Court at the hearing on this action that petitioner had told his draft board before making the application that—"I am an alien illegally in the United States; if I can become a citizen, I want to go into the Army, if I can't become a citizen, I don't want to go into the Army" (R. 25); and his draft board had told him that an alien illegally in the United States could not become a citizen by joining the Army (R. 26). Approximately six months after filing the application, in October of 1943, petitioner discovered that service overseas would permit an alien illegally in this country to become a citizen (R. 26). He accordingly submitted a request for withdrawal of Form 301 and induction into the United States armed forces (R. 2). Thereafter, his claim for exemption was no longer honored. He was called for induction, and rejected for defective vision (R. 2).

Deportation proceedings were instituted against petitioner; and on March 30, 1944, he was granted permission to adjust his status through preexamination and voluntary departure (R. 2). On January 16, 1946, he reentered through Canada and was admitted for permanent residence (R. 2).

The present deportation proceedings were instituted in 1947 on the ground that petitioner's application for exemption from military service as a national of a neutral country rendered him ineligible for citizenship under Section 3(a) of the 1940 Act at the time of his last entry, and that fact made his 1946 entry illegal (R. 2).

The District Court found that petitioner was not ineligible for citizenship, based solely on its conclusion that

Denmark was, in fact, not a neutral country (R. 10-11).[1] The District Court noted that ordinarily the neutrality of a foreign power was a political question to be determined by the President or the Secretary of State, but ruled that in this case the executive branch of the government had not made a formal determination (R. 10-11). The Court of Appeals, in reversing, held that the Director of Selective Service acted under the supervision of the President in making the determination that Denmark was neutral, and therefore the courts should not entertain a collateral attack on that determination (Pet. 18).

In answer to petitioner's contention that the determinative factor in creating ineligibility under Section 3(a) of the 1940 Act was not the making of the application for exemption but the granting of the relief, the Court of Appeals noted that his complaint before the District Court did not allege that the deferment was based on anything other than his application; the case was not tried on such a basis; and there was no definite offer to show that the deferment was actually based on another ground (Pet. 18-19). Under those circumstances, the court held that there was no justification for remanding the case to the District Court for a determination of the ground of deferment (Pet. 19). However, the Court of Appeals has stayed the issuance of a copy of its judgment pending disposition by this Court of *Ceballos* v. *Shaughnessy*, No. 71, this Term, certiorari granted, June 11, 1956, 351 U.S. 981, or until further order (R. 55). The question raised in the petition for a writ of certiorari in *Ceballos* is whether ineligibility for citizenship under Section 3(a) of the

[1] This issue had not been raised before the administrative agencies which ruled that petitioner was deportable (R. 41).

Selective Training and Service Act of 1940 results from the alien's act of claiming exemption from military service or whether there must also be evidence of formal recognition of the claim.

The Court of Appeals further held that the misinformation given petitioner by his draft board, as to whether his induction would facilitate or authorize his naturalization, was not the sort of mistake as to the nature of an application for relief from liability or its immediate consequences which led this Court in *Moser* v. *United States*, 341 U.S. 41, to declare that Moser's application did not render him ineligible for citizenship (Pet. 19-20).

ARGUMENT

1. Petitioner challenges (Pet. 8-9) the holding of the court below that the determination by the Director of Selective Service that Denmark was a neutral country for the purpose of Section 3(a) of the Selective Training and Service Act (*supra*, pp. 2-3) is controlling on the courts and cannot be collaterally attacked (Pet. 18). The decision below on this issue is in accord with that of the Ninth Circuit in *Bussoz* v. *United States*, 218 F. 2d 683, 686-687, certiorari denied, 350 U.S. 824. It follows the well-established principle that the courts will not interfere with decisions of the political branch of the government concerning matters of foreign policy. See *e.g.*, *Chicago and Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103, 111-113; *United States* v. *Belmont*, 301 U.S. 324, 330; *United States* v. *Curtiss-Wright Corporation*, 299 U.S. 304, 315-322; *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 302; *Jones* v. *United States*, 137 U.S. 202, 212. The belligerent status of an occupied country during World War II is just such a political question, the determination of

which by the executive branch of the government should be accepted by the courts.

Both the District Court and petitioner's attorney, in arguing before it, apparently agreed that a decision on this question by the executive branch of the government should bind the courts, but refused to recognize that any one other than the President or the Secretary of State could so act (see *e.g.*, R. 10-11, 27, 38-39). In determinations involving the Selective Training and Service Act of 1940, however, Congress expressly, in Section 10 of the Act (*supra*, p. 3), authorized the President to delegate his authority to the Director of Selective Service. Thus, the Director was acting on behalf of the Executive, and specifically on behalf of the President, when he made his determination of Denmark's neutrality. *Bassoz* v. *United States*, 218 F. 2d 683, 686-687 (C.A. 9) certiorari denied, 350 U.S. 824. That determination by the Director should therefore be honored by the courts in the same way as any other determination of a political question by the executive branch. Cf. *Bingman* v. *United States*, 156 F. 2d 148, 150 (C.A. 9), certiorari denied, 329 U.S. 720, and *Poodenko* v. *United States*, 147 F. 2d 752 (C.A. 10), certiorari denied, 324 U.S. 860.

Even if the determination of neutrality were reviewable, however, there is no basis for overruling that made by the Director of Selective Service. Petitioner himself claimed exemption from military service on the basis of Denmark's neutrality. And it is a matter of public knowledge and record that the territory of Denmark was occupied by the German armed forces in less than a day; that Denmark never declared war on either the United States and its allies or on Germany and its allies; and that none of the belligerent powers declared

war on it. Under these circumstances, the determination that Denmark was neutral cannot be said to be either arbitrary or capricious.

That the neutrality of Denmark may have been viewed differently for other purposes (such as with respect to the Trading with the Enemy Act and the military government of Germany, mentioned by petitioner (Pet. 8)[2]) does not warrant the conclusion that the Director was wrong in his determination that it was neutral for the purpose of granting exemptions to resident aliens under the Selective Training and Service Act. The concept of "neutrality," like the concept of "residence," need not necessarily be the same for all purposes. For example, the regulation by the Director of Selective Service that aliens who have resided in this country more than three months shall be deemed "resident" aliens, unless they apply for determination of status, has been upheld as applied to an alien admitted as a business visitor, against the claim that in many other aspects he is not deemed a "resident." *Mannerfrid* v. *United States*, 200 F. 2d 730 (C.A. 2), certiorari denied, 345 U.S. 918.

Petitioner also attempts to justify court review of the political question of Denmark's neutrality by restyling it as merely a question of whether the Selective Service System complied with its own regulations when it made its determination (Pet. 8-9). These regulations, 32 C.F.R. 601.2 (*supra*, pp. 4-5), required the Director to determine whether petitioner was a neutral alien under a definition defining a neutral alien as any alien except a citizen or subject of a "cobelligerent country" or an "alien enemy," which terms are also defined. The

[2] Petitioner concedes that the Department of State apparently took no position on the issue of Denmark's status.

Director made his determination within these general definitions, based upon valid grounds, as we have pointed out, *supra*, pp. 9-10. The application of the regulations was, therefore, neither arbitrary nor capricious.

2. Petitioner seeks review of the decision below that his case should not be remanded for a determination of the actual grounds for his deferment from military service (Pet. 7-8). While the Court of Appeals found that the complaint, read as a whole, did not show that petitioner was claiming that he had not received deferment as a neutral alien, it nevertheless stayed issuance of a certified copy of its opinion until further order, or until this Court reaches a decision in *Ceballos* v. *Shaughnessy*, No. 71, this Term, as to whether the mere claiming of exemption from military service as a neutral alien creates a bar to citizenship under Section 3(a) of the Selective Training and Service Act of 1940, or whether, in addition, there must be evidence of formal recognition of the claim (R. 55). This Court may therefore wish to defer consideration of the petition, on this issue, until the disposition of *Ceballos*.

3. Petitioner also contends that he filed his application for exemption from military service under the same type of mistaken advice which led this Court in *Moser* v. *United States*, 341 U.S. 41, 47, to hold that the alien there involved did not make an intelligent waiver of citizenship under Section 3(a) of the Selective Training and Service Act of 1940 (Pet. 5-7), and was not debarred from citizenship. A comparison of the circumstances under which Moser and petitioner made their applications refutes this contention.

The alleged mistaken advice given to petitioner was by a local draft board official who told him that service

in the army would not facilitate his becoming a citizen (R. 26). Petitioner does not allege that he elected to make the application for exemption with any misconceptions as to the fact that to do so would forever bar him from becoming a citizen.

The mistaken advice given to Moser was by the Swiss Consulate (upon the advice of the Department of State) which assured him that he would not be debarred from becoming a citizen by making application for exemption on Revised Form D.D.S. 301, which revision, made by special arrangement of the Department of State with the Selective Service System to give recognition to certain treaty rights of Swiss nationals, did not contain a stipulation that the application would debar the applicant from becoming a citizen, as did Form 301 signed by petitioner. 341 U.S. at 43-45. Moser, unlike petitioner, filed the application in the belief that he would not be barred from becoming a citizen. 341 U.S. at 46-47.

Under these dissimilar factual circumstances, the decision below cannot be said to conflict with that in *Moser*. Rather, it is in accord with the Second Circuit in *Mannerfrid* v. *United States*, 200 F. 2d 730, 732-733, certiorari denied, 345 U.S. 918, which held that a collateral mistake as to the consequences of not making an application for exemption from military service did not come within the *Moser* rule.

Congress evinced a clear purpose in Section 3(a) of the 1940 Act to bar from citizenship those aliens from neutral countries who did not choose to fight for this country. It would be inconsistent with that objective to hold that one who knew he was waiving his rights to citizenship when he filed his application for exemption was nevertheless not debarred from citizenship in spite

of the statute, because he was misinformed as to the consequences of *not* making the application.

CONCLUSION

The Court may wish to defer consideration of the issue already pending in *Ceballos* v. *Shaughnessy*, No. 71, this Term, until the disposition of that case. As to the other issues raised by petitioner, the decision below is in accord with well-established principles of law and presents no conflict or inconsistency with a decision of this Court or of other circuits. On those issues, certiorari should be denied regardless of the disposition of *Ceballos*.

Respectfully submitted,

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